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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	

To: The Commission

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OFFICE OF SECRETARY

REPLY OF McCAW CELLULAR COMMUNICATIONS, INC. TO OPPOSITIONS TO PETITION FOR CLARIFICATION

McCaw Cellular Communications, Inc. ("McCaw"), pursuant to Section 1.429(g) of the Commission's rules, 47 C.F.R. § 1.429(g), hereby submits this reply to oppositions to McCaw's Petition for Clarification filed in the above-captioned proceeding. Relatively few parties have opposed the clarifications McCaw has requested, and the oppositions that have been filed generally reflect broader disagreements not merely with McCaw but with the positions of the Commission set forth in the Second Report and Order[1]. McCaw's proposed clarifications are entirely consistent with the statutory mandate and would serve to further the pro-competitive policies embodied in the regulatory scheme the Commission has adopted in implementing Section 332(c).

[1] FCC 94-31 (released March 7, 1994), 59 Fed. Reg. 18493 (April 19, 1994) ["Order"].

I. THE COMMISSION SHOULD CLARIFY THAT STATES LACK THE AUTHORITY TO IMPOSE INTERCONNECTION REQUIREMENTS ON PROVIDERS OF COMMERCIAL MOBILE RADIO SERVICES

The Commission has initiated an inquiry into the appropriate nature and scope of interconnection obligations of providers of commercial mobile radio services ("CMRS").[2/] For the reasons set forth in McCaw's petition,[3/] and consistent with the Commission's plenary authority over interconnection arrangements,[4/] the Commission should clarify that states lack authority to impose interconnection requirements on CMRS providers.

MCI, the only party to address McCaw's request in an opposition pleading, asserts that initiation of a Commission inquiry is "no impediment" to state action on the same topic and that McCaw has not demonstrated a "need" for the requested relief because it does not appear "that many such state proceedings are underway."[5/] The fact that not "many" state proceedings

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[2/] See Report DC-2612 (June 9, 1994). The Commission appropriately chose to take this course of action in view of the complexities surrounding this issue and the conflicting information it received in connection with its initial rulemaking. See Order at ¶ 237.

[3/] McCaw Cellular Communications, Inc., Petition for Clarification ("McCaw Pet.") at 7-9.

[4/] See 47 U.S.C. § 332(c)(1)(B); H.R. Rep. No. 111, 103d Cong., 1st Sess. 261 (1993) ["House Report"]. Even before the amendments to Section 332(c), the Commission had long asserted exclusive authority over the nature and scope of interconnection obligations in the mobile services. See 1987 Interconnection Order, 2 FCC Rcd. 2910, 2912-13; see also Order at ¶ 228.

[5/] MCI Comments ("MCI Opposition") at 11. MCI's Opposition (id. at 10-11) also notes that NARUC, in its petition, asks the Commission to "[c]larify that the FCC has not yet acted to preempt State regulation of CMRS interconnection rates and that all CMRS interconnection issues, including preemption, can be raised in the posed notice of inquiry." Petition for Reconsideration and Clarification of the National Association of Regulatory Utility Commissioners at 3, 7-8. NARUC, however, has not opposed McCaw's request that the Commission make clear that states are not be permitted to mandate interconnection or unbundling pending completion of the Commission's inquiry.

regarding CMRS interconnection are underway[6] is no rebuttal to the appropriateness of McCaw's request but rather confirms its non-controversial nature. Even MCI acknowledges that those states "which do adopt CMRS-to-CMRS interconnection requirements or mandatory unbundling" will be "well advised to consider the likelihood of Federal preemption."[7] It would be senseless -- and contrary to legislative intent -- to permit states to go forward with CMRS-to-CMRS interconnection requirements pending the completion of the Commission's inquiry.[8]

II. THE PRINCIPLES OF MUTUAL COMPENSATION AND THE "GOOD FAITH" NEGOTIATION STANDARD SHOULD APPLY TO ALL INTERCONNECTION ARRANGEMENTS

McCaw has asked the Commission to clarify that the principle of mutual compensation (as an essential component of the LECs' "reasonable interconnection" obligation[9]) is applicable to intrastate as well as interstate CMRS traffic, and to reaffirm that negotiations over the rates for intrastate interconnection (including mutual compensation) should be subject to the "good faith" standard applicable to negotiations over interstate interconnection rates. As explained in

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[6] In fact, as described in McCaw's petition, at least one important state -- California -- is currently exploring the imposition of unbundling requirements on CMRS providers. See McCaw Pet. at 9 n.17.

[7] MCI Opp. at 11 n.28.

[8] Despite the clear Congressional objective of establishing a uniform Federal regulatory scheme for CMRS in order to ensure a seamless national wireless infrastructure and the fact that the statute preempts state regulation of rates relating to CMRS, certain parties continue to assert -- contrary to the Commission's conclusion (Order at ¶ 237) -- that states may regulate CMRS-to-CMRS interconnection rates. See, e.g., Opposition Comments of the National Association of Regulatory Utility Commissioners at 1-3; Partial Opposition to Petitions for Reconsideration or Clarification of the Public Utilities Commission of the State of California at 1-3. This contention is meritless. See McCaw Opp. at 15-17; Response of BellSouth ("BellSouth Opp.") at 3-4; Oppositions/Comments to Petitions for Reconsideration of the Cellular Telecommunications Industry Association at 6-8; Opposition of Personal Communications Industry Association at 3.

[9] Order at ¶ 230.

McCaw's petition, ensuring conformance with these principles regardless of jurisdiction will ensure the continued development of a seamless national wireless infrastructure.[10]

Those parties opposing McCaw's request do not dispute that subjecting CMRS providers to one set of rules governing interstate interconnection arrangements and widely varying rules governing intrastate interconnection would tend to hinder, not promote, the growth and development of mobile services -- services "that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[11] Instead, parties opposing McCaw's request argue that mutual compensation is a "rate issue" relating to purely intrastate communications and, therefore, is subject only to state jurisdiction.[12]

Contrary to these contentions, the principle of mutual compensation is separate from the question of the actual rates that a carrier pays to another carrier for switching and terminating traffic originating on the carrier's network.[13] Moreover, unlike interconnection rates, a carrier's obligation to provide reasonable interconnection is not segregable between intrastate and interstate CMRS services. Unless mutual compensation and the good faith negotiation standards are applied to both intrastate as well as interstate traffic, CMRS providers could face the burden of terminating and switching traffic without later recovering the costs for such services. Such an environment would frustrate the intent of Congress of "ensuring CMRS interconnection to the interstate network."[14]

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[10] McCaw Pet. at 5-7.

[11] House Report at 260.

[12] See, e.g., BellSouth Opp. at 2-3; Opposition by Pacific Bell and Nevada Bell to Petitions for Reconsideration ("PacBell Opp.") at 23-24.

[13] See McCaw Pet. at 6.

[14] Order at ¶ 230.

Two parties rely on Indianapolis Tel. Co. v. Indiana Bell Tel. Co., Inc.[15] in arguing that the Commission has no jurisdiction over financial arrangements for intrastate interconnection.[16] Reliance on this decision in the present context is misplaced. There, the Commission addressed LEC-cellular interconnection issues as they stood in 1986, prior to Congress's amendment to Section 2(b) of the Communications Act making clear that the Federal-state "dualism" embodied in that provision does not apply to Commission actions pursuant to Section 332.[17] Enactment of Section 332 created a comprehensive and preemptive statutory framework aimed at ensuring uniform regulation of commercial mobile radio services. The Commission plainly has authority under this regime to require LECs to provide "reasonable and fair interconnection" and to define that obligation as the Commission sees fit to further the statutory objectives.

III. THE COMMISSION SHOULD CLARIFY THAT STATES LACK THE AUTHORITY TO REQUIRE THE FILING OF INFORMATIONAL TARIFFS

In the Order, the Commission properly recognized that conditions in the CMRS market are sufficiently competitive to warrant forbearance from requiring, or even permitting, CMRS providers to file tariffs.[18] Consistent with this policy, McCaw has asked the Commission to clarify that states may not require CMRS providers to file informational tariffs (with or without rate information) for intrastate CMRS services.[19]

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[15] 1 FCC Rcd 228 (Com.Car.Bur.), aff'd, 2 FCC Rcd 2893 (1987).

[16] See BellSouth Opp. at 2; PacBell Opp. at 24.

[17] 47 U.S.C. § 152(b) (establishing that the Commission generally lacks jurisdiction over intrastate communications "except as provided in . . . section 332") (emphasis supplied).

[18] Order at ¶¶ 173-175, 178.

[19] McCaw Pet. at 9-11.

MCI, the only party to object to McCaw's requested clarification, has opposed several aspects of the Commission's tariffing forbearance decision;[20] it therefore comes as no surprise that MCI would oppose further action consistent with the Commission's forbearance decision. Indeed, by pointing out that "[t]ariff rules, both substantive and procedural, vary widely from state to state,"[21] MCI's opposition confirms -- rather than rebuts -- the appropriateness of McCaw's request. MCI offers no argument in support of its opposition to McCaw's request other than to assert that it is "not clear" that a state would be exceeding its authority by issuing informational tariffs.[22] There can be little doubt, however, that the Commission has the authority to displace state regulatory actions that would directly undermine actions the Commission has lawfully taken -- such as its tariffing forbearance decision -- pursuant to the authority conferred on the Commission by Section 332(c). The Commission retains plenary authority over commercial mobile services[23] unless and until a state successfully petitions the Commission for authority to regulate CMRS rates.[24] Clearly, a state that has not obtained certification to regulate intrastate CMRS rates may not impose tariff requirements on CMRS providers.[25]

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[20] See MCI Petition for Clarification and Partial Reconsideration at 2-12.

[21] MCI Opp. at 12.

[22] Id.

[23] See 47 U.S.C. § 152(b).

[24] 47 U.S.C. § 332(c)(3)(A). Moreover, Congress provided for state certification to regulate rates only when significant market failure justified the substitution of regulation for the operation of market forces. See id.

[25] As McCaw has demonstrated, state authority over the "terms and conditions" of mobile services does not permit the states to require the filing of informational tariffs for intrastate CMRS service. See McCaw Pet. at 9-11.

IV. THE COMMISSION SHOULD ACCORD CMRS PROVIDERS FLEXIBILITY IN PRICING CMRS SERVICES

In its petition, McCaw requested that the Commission prescribe a standard governing CMRS rate challenges brought pursuant to Section 208.[26/] Inter alia, McCaw sought a clarification that a CMRS rate will not be found to be "unjust and unreasonable" or "unreasonably discriminatory" if other providers in the marketplace charge similar rates for equivalent services.[27/] This pricing flexibility is especially warranted during the statutorily-mandated transition period,[28/] when "private" carriers offering commercial services may continue to price and customize their services free of the regulatory burdens imposed on their common carrier competitors.

Unsurprisingly, Nextel (which stands to benefit from this continuing disparity) and MCI (which has acquired a substantial stake in Nextel) are the only parties to oppose McCaw's request.[29/] Nextel asserts that McCaw's proposal would create a "competitive necessity

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[26/] McCaw Pet. at 12-14.

[27/] Id. at 14. In such circumstances, it is entirely appropriate to conclude that the rates offered are the product of market forces. At minimum, a CMRS rate that is comparable to the rates charged by other CMRS providers for equivalent services should be deemed presumptively lawful.

[28/] See Order at ¶ 280.

[29/] MCI's opposition is limited to a single sentence asserting that because the Commission has never engaged in price regulation of interstate cellular rates, it is "difficult to fathom what additional pricing flexibility" is needed. See MCI Opp. at 5. This contention is a non sequitur. The issue McCaw has raised concerns the standard applicable with respect to complaints brought pursuant to Section 208; McCaw's request has nothing to do with any notion of Commission "price regulation" of cellular rates.

presumption of lawfulness" of CMRS rates -- a presumption that, according to Nextel, the Commission "has repeatedly rejected."[30]

Nextel's argument is wholly inapplicable to the present context. Pricing policies appropriate for the predominant landline interexchange carrier have no relevance to the CMRS marketplace. CMRS providers have single digit shares of potential customers; McCaw, the country's largest cellular carrier, has never served more than five percent of the potential subscribers in its cellular markets. By contrast, AT&T was the entrenched provider of interexchange service, with nearly 100 percent of the available market, at the time dominant carrier regulation was adopted. According CMRS providers the kind of pricing flexibility sought by McCaw does not create the consumer and competitive risks that have caused the Commission to exercise restraint with respect to AT&T.[31] The Commission should not exacerbate the temporary, statutorily-created disparities between providers of functionally equivalent mobile services by imposing a pricing straitjacket on cellular licensees.

V. THE COMMISSION SHOULD CLARIFY THAT ALL CMRS PROVIDERS, NOT JUST PCS PROVIDERS, CAN PROVIDE SERVICE ON A PRIVATE CARRIAGE BASIS OVER THEIR AUTHORIZED FREQUENCIES

McCaw has sought clarification that all CMRS providers, not only PCS providers, may offer private and commercial services on the same authorized frequencies.[32] In an effort to

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[30] Id. at 8, citing Memorandum and Order, Competitive Pricing Plan Nos. 19, 20, 21, 22, 6 FCC Rcd 5615 (1991); Memorandum and Order, Competitive Pricing Plan No. 2 Resort Condominiums International, 6 FCC Rcd 5648 (1991).

[31] To the contrary, the Commission has encouraged CMRS providers to offer customized services that respond to market demand. See Order at ¶ 65 n.130.

[32] McCaw Pet. at 15-16. The Commission has stated expressly that PCS providers possess this flexibility, see Order at ¶ 115, and has implied that the policy applies to all CMRS providers. See id. (stating that the Commission would "favor issuing a single license to CMRS providers offering both commercial and private services on the same frequency)."

(continued...)

perpetuate disparities that Congress plainly sought to eliminate, however, Nextel argues that the Commission should not accord cellular providers "the benefit of the same regulatory treatment as PCS" because the Commission "conclu[ded] that the cellular market is not fully competitive."[33]

Nextel makes two mistaken assumptions. First, it presupposes that the Commission has the authority to treat PCS and non-PCS CMRS providers disparately "insofar as" such entities seek to engage in the provision of private mobile service. Both the language and purposes of Section 332(c) refute this notion.

Second, Nextel assumes that the Commission's inability to confirm that the cellular market is "fully" competitive is enough to deny cellular providers regulatory treatment equal to that accorded to PCS providers. Nextel offers no reasoned basis for this position. It is unclear why participation by an entity in one segment of the commercial mobile services market -- even a segment of that market that may be less than "fully" competitive -- should serve to bar entry by that entity in the separate market for private mobile services.[34]

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[32](...continued)
Section 332(c), as amended, makes clear that the same provider may engage in the provision of both commercial mobile service and private mobile service, and that the regulatory focus must be on the nature of the service -- not the provider. Section 332(c)(1)(A) provides that a person engaged in the provision of a service that is a commercial mobile service [as defined in Section 332(d)(1)] shall, "insofar as such person is so engaged," be treated as a common carrier. By contrast, Section 332(c)(2) provides that a person engaged in the provision of a service that is a private mobile radio service [as defined in Section 332(d)(2)] "shall not, insofar as such person is so engaged, be treated as a common carrier" (emphasis supplied).

[33] Opposition of Nextel Communications, Inc. at 7.

[34] Further, because the statutory definition of "private mobile service" excludes any commercial mobile service "or the functional equivalent of a commercial mobile service," MCI's fm assertions (MCI Opp. at 5-6) that allowing cellular carriers to offer private mobile services would "result in unreasonable price discrimination" against "small accounts" has no basis. A provider of any service that meets the broad definition of commercial mobile radio
(continued...)

CONCLUSION

The clarifications McCaw has proposed are entirely consistent with the congressional objectives embodied in Section 332(c) and the regulatory scheme the Commission has adopted in the Second Report and Order. They should be adopted.

Respectfully submitted,

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[34](...continued)
is subject to the non-discrimination and other requirements of common carrier regulation, not to mention the discipline of market forces, with respect to the offering of such a service. MCI fails to explain how the ability of a cellular provider to offer private mobile services could result in harm to "small accounts." Even in the private mobile services marketplace, rates charged by cellular operators would have to remain reasonable in order to be commercially viable.

CERTIFICATE OF SERVICE

I, ANTHONY E. VARONA, certify that on this 27th day of June, 1994, a copy of the foregoing Reply of McCaw Cellular Communications, Inc. to Oppositions to Petition for Clarification, was sent by U.S. mail, postage prepaid, to each of the parties listed below:

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